No. 80-336

OCT 24 1980

MICHAEL RODAK, JR., CL

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

JUDY ELIZABETH BRUBECK and
VIRGINIA CHRISTINE MARTIN,

Appellants,

v.

STATE OF FLORIDA,

Appellee.

On Appeal from the District Court of Appeal of the State of Florida, in and for the Second District

MOTION TO DISMISS OR AFFIRM

JIM SMITH
ATTORNEY GENERAL

CHARLES CORCES, JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
Tel.: 813/272-2670

Counsel for Appellee

MOTION TO DISMISS OR AFFIRM

The appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the District Court of Appeal of the State of Florida, in and for the Second District, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I

THE COUNTY ORDINANCE INVOLVED AND THE NATURE OF THE CASE

A. THE ORDINANCE

This appeal raises the question as to the facial and, as applied, validity of the ordinance of Lee County, Florida, Number 75-9.

The provisions of the ordinance adequately appear on pages three through five of the Jurisdictional Statement and for brevity's sake will not be repeated here.

B. THE PROCEEDINGS BELOW

The proceedings below are adequately presented in the Jurisdictional Statement and will not be repeated here.

II

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT

Appellants recognize that the facial validity of this same ordinance was raised by appeal to the Court in *Martin v. Board of County Commissioners of Lee County*, 441 US 918 (1979), and that there the Court dismissed the appeal

for want of a substantial federal question (Jurisdictional Statement, page seven).

They argue, however, that such dismissal does not prohibit them from again raising the facial validity of the ordinance. They are mistaken.

An appeal dismissed for want of a substantial federal question is a ruling on the merits, *Hicks v. Miranda*, 422 US 332 (1975).

Next they argue that the ordinance is unconstitutional as applied. This involves a factual determination. Appellants pled nolo contendere to having violated the ordinance. While in Florida one may plead nolo contendere, reserving the right to appeal questions of law, he may not reserve the right to appeal questions of fact, *State v.*

Ashby, 245 So.2d 225 (Fla. 1971); *Chesebrough v. State*, 255 So.2d 673 (Fla. 1971), because a plea of nolo contendere releives the state of its burden of proving factual matters, *Bell v. State*, 369 So.2d 932 (Fla. 1979).

By pleading nolo contendere appellants admitted to conduct which is proscribed by the ordinance and not protected under the First Amendment of the Constitution of the United States. This is so because the Florida appellate court held that ". . . the acts proscribed by the ordinance represent conduct rather than speech or expression, and as such there is no contravention of the constitutional guarantees of free speech."[1] Since the

---

1 *Board of County Commissioners of Lee County v. Dexterhouse*, 348 So.2d 916, 920 (Fla. 2d DCA 1977).

Court has found the ordinance to be facially constitutional and since the Florida appellate court has held the proscribed conduct does not infringe on First Amendment rights, appellants' pleas settled any factual determination as to whether the ordinance was unconstitutionally applied.

This is true, the depositions of the officers notwithstanding,[2] because those depositions only disclose what the officers saw, not what appellants actually did. Appellants may have engaged in conduct not seen by the officers. Where knowingly and intelligently entered,

---

2 We do not concede in making this argument that the acts witnessed by the officers involve protected First Amendment rights. Those acts involved conduct proscribed by an ordinance which the Court held constitutional. Consequently, even accepting the depositions at face value, the statute was constitutionally applied.

a plea of nolo contendere is not rendered infirm simply because the state could not have proven its case. The plea itself admits all the facts well pled.

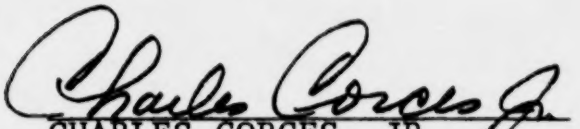
Consequently, the judgment of the Florida appellate court rests on an adequate nonfederal basis.

CONCLUSION

Based upon the reasons set forth hereinabove, the Court is respectfully requested to dismiss this appeal or affirm the judgment of the Florida appellate court.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

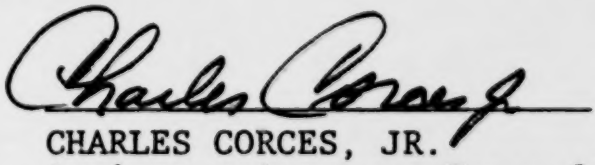


CHARLES CORCES, JR.
Assistant Attorney General
1313 Tampa Street
Suite 804
Park Trammell Building
Tampa, Florida 33602
Tel.: 813/272-2670

Counsel for Appellee

CERTIFICATE OF SERVICE

I, CHARLES CORCES, JR., Counsel of Record for Appellee, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22nd day of September, 1980, I served three copies of the Motion to Dismiss or Affirm on Steven Carta, Esquire, Counsel of Record for Appellants, Smith, Carta & Ringsmuth, Post Office Box 2446, Fort Myers, Florida 33902, by a duly addressed envelope with postage prepaid.



CHARLES CORCES, JR.
Assistant Attorney General
Of Counsel for Appellee